92-1737

Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ARCHER C. FREY

Petitioner,

v.

STATE OF CALIFORNIA; STATE OF CALIFORNIA MILITARY DEPARTMENT,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

LEO F. DONAHUE, Esq.
Counsel of Record

11246 Gold Express Drive, Suite 100
Gold River, CA 95670
(916) 635-5577

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a non-federally recognized California State National Guard member is an "employee" within the meaning of the Age Discrimination in employment Act (ADEA), 29 USC 621-43, specifically, Section 630(f), and therefore included within the ADEA's general prohibition of mandatory retirement and thus not subject to the mandatory retirement provision of California Military and Veterans Code, Section 167?

2. Whether there is an "actual conflict" between the ADEA and California Military and Veterans Code, Section 167 thus requiring pre-emption of Section 167 by the ADEA under the supremacy clause?

3. Whether the exclusion of Petitioner from the protection of the ADEA impermissibly restrains Congress' legislative authority and is an intrusion on a co-equal branch of the government?

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LISTING OF REPORTS AND OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. Opinion of District Court delivered by the Hon. David F. Levi, United States District Court, Eastern District of California, granting Respondents' Motion to Dismiss under FRCP, Rule 12(b)(6); June 7, 1991.

2. Denial of Appeal, before the Hons. William C. Canby, Jr., Stephen Reinhardt, and Edward Leavy, Circuit Judges for the United States Court of Appeals for the Ninth Circuit: January 5, 1993.

STATEMENT OF JURISDICTION

Date of the entry of judgment sought to be reviewed: January 5, 1993. Denial of appeal by the United States Court of Appeals for the Ninth Circuit from the granting of Respondents' motion to dismiss, FRCP. Rule 12(b)(6) in the United States District Court, Eastern District of California.

This Court has jurisdiction to review the judgment in question by writ of certiorari by virtue of 28 USC 1254(1), Rules of the United States Supreme Court, Rule Number 10.

PERTINENT STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const., Art I, Sec 8, cl 12: "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."

U.S. Const., Art I, Sec 8, cl 16: "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

5 USC 102: "The military departments are: The Department of the Army. The Department of the Navy. The Department of the Air Force."

5 USC 102, Revisor's Note: "This section is supplied to avoid the necessity for defining "military departments" each time it is used in this Title (5 USC, Section 101 et sec.). See 10 USC 101(7)."

10 USC 101(4): " 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard."

10 USC 101(7): " 'Military departments' means the Department of the Army, the Department of the Navy, and the Department of the Air Force."

10 USC 101(10): "The term 'Army National Guard' means that part of the organized militia of the several States ... that...(D) is federally recognized."

10 USC 3062(c): "The Army consists of- (1) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve..."

10 USC 3843(b): "...each commissioned officer...shall, on the last day of the month in which he becomes 60 years of age- (2) ...be discharged from his reserve appointment."

29 USC 623(a): "It shall be unlawful for an employer...(1) to fail or refuse to hire or to discharge any individual...because of such individual's age..."

29 USC 630(b): "The term 'employer' means...(2) a State...and any agency or instrumentality of a State...but such term does not include the United States..."

29 USC 630(f); "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on

such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office."

29 USC 633(a)(a): "All personnel actions affecting employees...who are at least 40 years of age...in military departments as defined in section 102 of Title 5, in executive agencies..."

32 USC 323(a): "Whenever a member of the National Guard ceases to have the qualifications prescribed under section 301 of this title...or ceases to be a member of

a federally recognized unit or organization of the National Guard, his Federal recognition shall be withdrawn."

32 USC 324(b): "...the appointment of an officer of the National Guard may be terminated or vacated as provided by the laws of the State or Territory of whose National Guard he is a member..."

42 USC 2000e-16(a): All personnel actions affecting employees...in military departments as defined in section 102 of Title 5, United States Code in executive agencies..."

California constitution Art VII, Section 4(k): "The following are exempt from civil service:... (k) Members of the militia while engaged in military service."

California Military & Veterans Code Section 167(a): "All commissioned officers...on permanent active duty with the Office of the Adjutant General shall be appointed by the Governor...and...may remain on active duty with the office either until age 60 or until federal recognition of grade or rank as a member of the California National Guard is withdrawn, whichever occurs later."

California Military & Veterans Code Section 210: "The National Guard consists of: (a) General officers. (b) The several staff corps and departments prescribed in tables of organization of the United States Army...or tables or organization for the National Guard. (c) The officers and enlisted men on the retired and the reserve lists. (d) The organizations forming the National Guard and persons enlisted or commissioned thereon."

Ops Cal. Atty. Gen. 54,55: " There would appear to be nothing which would distinguish the nature of their [State Active Duty members of the Office of the Adjutant General] employment by the State

from other public employees, except perhaps the designation of their service as military."

STATEMENT OF THE CASE

1. Factual Background

Appellant FREY, at all times, was a California State employee, who served as a commissioned officer in the California National Guard under Cal. Mil. & Vet. Code section 167(a). That Section provided for the mandatory retirement at age 60 of State commissioned active duty officers of the California National Guard who have lost their federal recognition. Because FREY had attained 30 years of commissioned service, FREY lost his federal recognition in 1985, the effect being that FREY ceased being a member of the Army National Guard of the United States. When he had lost his federal

recognition in 1985, FREY then was purely a State employee with no federal association at all. (See 32 USC 323(a); Cal. Mil & Vet Code section 210.) FREY was terminated from his State employment when he reached his 60th birthday under the provisions of Cal. Mil. & Vet. Code section 167(a).

During all times pertinent to this suit, FREY was simply a Civil Engineer, with the job title of Chief, Engineering Branch. FREY never served on active duty in the regular United States Army.

FREY, like other non-State National Guard state employees such as prison guards, correctional officers etc., could be being called to duty 24 hours a day; had no

entitlement to compensatory time off; was required to meet certain physical standards; wore a uniform; and, was an exempt employee under the California Constitution, art. VII, section 4(k). FREY's pay and allowances were determined by the State budget on a scale similar to the one used for officers in the United States Army; the job position determining what pay he would actually receive regardless of his rank. Although the State claims FREY was subject to the Uniform Code of Military Justice, there is a question of whether or not this was constitutionally permissible. Also like many other uniformed California State employees he could be called upon to perform

his duty in case of war, insurrection, rebellion, invasion, tumult, riot, breach of the peace, public calamity, catastrophe, or other emergency.

FREY filed the original complaint alleging four causes of action and seeking, inter alia, a declaration that the ADEA applies to him and Cal. Mil. & Vet. Code section 167 violates the ADEA.

FREY claimed original jurisdiction under 28 USC 1331, federal question.

2. Basis for Federal Jurisdiction in the Court of First Instance

FREY claimed also that Cal. Mil & Vet Code section 167 was in "actual conflict" with the ADEA and thus was pre-empted via the Supremacy Clause of the constitution. FREY

also sought damages for the alleged age discrimination and injunctive relief to prevent his forced retirement. After the district court denied his request for injunctive relief, he did not appeal from that denial.

Respondents moved to dismiss under FRCP, Rule 12(b)(6) for failure to state a claim. The district court granted the motion and it was affirmed by the court of appeals for the ninth circuit.

ARGUMENT

There is no dispute that since 1985 FREY was solely a state employee. (Indeed, under Maryland v.U.S. 381 U.S. 41, 47-48 (1965) FREY, even as a federally recognized State National Guard member was a state employee.) Even the California State Attorney General thought that FREY, and others like him, were state employees and should be treated as such:

> There would appear to be nothing which would distinguish the nature of their [State Active Duty members of the Office of the Adjutant General] employment by the State from other public employees, except perhaps the designation of their service as military. Ops. Cal. Atty. Gen. 54, 55.

There is no dispute that Congress had outlawed age discrimination by the states. There also is no dispute that the State of California was FREY's sole employer at least since 1985.

What is in dispute is whether the courts are free to extrapolate a mere Revisor's note to section 102 of Title 5 into a judicially created restraint of Congress' legislative authority after Congress has spoken "plainly and unequivocally" that FREY was included within the ADEA by this Court's decision in Gregory v. Ashcroft 111 S.Ct. 2395 (1991):

> The ADEA plainly covers all state employees except those covered by one of the exceptions. Where it is unambiguous that an employee

> does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included."

In Hill v. Berkman 635 F. Supp. 1228 (E.D.N.Y. 1986) the Court held that the ADEA did, in fact, apply to the armed forces. The Hill Court found that Congressional intent contained in references to legislative materials indicated that the 1972 amendments to Title VII, i.e., 42 USC 2000e-16(a), expanding ADEA protection to federal employees, were intended to apply broadly :See, e.g., H.R. Rep. No. 92-238, 92nd Cong., 2d Sess. reprinted in 1972 U.S. Code & Ad. News 2137, 2141, "The time has come to bring to bring an end to job discrimination once and for all, [for] every

citizen..."; 118 Cong. rec. daily ed., Mar. 6, 1972 at 7166 ("Opportunities for Millions of Americans"). Id. at 1234-35.

The Hill Court then discussed the Ninth Circuit's rationale in Gonzalez v. Dept. of Army 718 F.2d 926 (9th Cir. 1983) finding that the Gonzalez Court grounded its decision on the differences in the definitions of "military departments" found in Title 5 and Title 10 of the U.S. Code. The Hill Court found this distinction inadequate because the distinction was, incredibly, based solely on a mere "Revisor's Note." to 5 USC 102.

> At the onset it bears mention that the "Revisor's Note" was not, so far as we can determine, seriously reviewed by Congress.

> Section 101(7) [10 USC 101(7)] is located near Section 101(4) [10 USC 101(4)], which has a separate definition of "armed forces". See 718 F.2d 928. Id. at 1236.

The Hill Court found further fault in the Gonzalez rationale:

> In other contexts, courts, including the Ninth Circuit, have found that "military departments" in other statutes includes members of the armed forces. See, e.g., U.S. v. Webber Aircraft Corp. 465 U.S. 792 (1984)[Citation omitted] (applying Freedom of Information Act): Blevins v. Plummer, 613 F.2d. 767 (9th Cir. 1980)(applying Privacy Act). Id. at 1236.

Here, unlike the cases cited by the Ninth Circuit in their Gonzalez or Helm (Helm v. State of California 722 F.2d 507 (9th Cir. 1983) decisions, FREY did not fit

within the description of "armed forces" according to 10 USC 101 (a logical requirement according to the Ninth Circuit until this case) because he was a state employee.

Additionally, this case presents an "actual conflict" pre-emption situation. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail" Fidelity Federal Savings & Loan Assn. v. De La Cuesta, 458 U.S. 148,153 (1962), quoting Free v. Bland, 369 U.S. 663, 666 (1962). It is clear from the language of the Statute

(29 USC 630(f)) that Cal.Mil & Vet Code section 167 is in direct conflict with 29 U.S.C. section 630(f) of the ADEA.

Lastly, the Ninth Circuit decision in this case is contrary to this Court's decision in Gregory v. Ashcroft 111 S.Ct. 2395 (1991), where this Court, erroneously or not, imposed upon Congress a "plain statement" requirement concerning the application of the very section of the very statute that is in question in this case, 29 USC 630(f).

Whether this case must be decided using this "plain statement" requirement (although the ADEA plainly satisfies the "clear statement" requirement, See Davidson v.

Board of Governors of State Colleges and Universities, 920 F.2d 441,443 (CA 7, 1990.)) or by the principles of statutory interpretation, the result will be the same: The ADEA prohibits the firing of FREY, a state employee, from his state job.

The State of California, if it wishes to terminate state employees must seek escape from the ADEA from Congress, not from the courts. See South Carolina v. Baker, 485 U.S. 505, 512 (1988) "...States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."

CONCLUSION

FREY, unlike the federally recognized employees exempted from the ADEA by the actions of the Ninth Circuit, does not have available to him those other forums of redress of ills, e.g., the Board for Corrections of Military Records, the Discharge Review Board, etc. Why? Because he is a state employee. By the present activist decision by the Ninth Circuit, FREY now is neither fish nor fowl. He is sufficiently like federal military members to preclude protection by the ADEA, but he is not sufficiently federal to obtain protection from the other forums of redress available to the federal military.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ARCHER C. FREY,

Plaintiff, Civ. S. 90-1234-DFL

v. MEMORANDUM OF DECISION

STATE OF CALIFORNIA;

STATE OF CALIFORNIA

MILITARY DEPARTMENT,

Defendants.

This matter was submitted on March 8, 1991, on defendants' motion to dismiss. Plaintiff is an active duty member of the California National Guard who sues for age discrimination because of the State's mandatory retirement age of 60. For the reasons discussed below, defendants' motion is granted.

I. BACKGROUND

Plaintiff Archer Frey is a commissioned officer of the California National Guard on State Active Duty in the Office of the Adjutant General. He has served in the Guard since 1971. Frey's job title is Chief, Engineering Branch. He has attained

the rank of Colonel. In 1985, because of his age, Frey lost federal recognition and at that tine ceased to be a member of the National Guard of the United States (Army National Guard).[1] He is not only an

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[1] The National Guard of the several states and the National Guard of the United States are overlapping entities. As in the case of plaintiff here, one may be a member of the state national guard (state militia) but not a member of the Army or Air National Guards of the United States. Thus, by statute the term "the Army National Guard," is defined as:

"[T]hat part of the organized militia of the several states... that--(A) is a land force; (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution; (C) is organized, armed, and equipped wholly or pertly at Federal expense; and (D) id federally

officer in the California National Guard. See 32 U.S.C. section 323(a) and Cal. Mil. & Vet. Code section 210. Despite his loss of federal recognition, as a member of the California National Guard on State Active Duty, plaintiff is subject to being called to duty 24 hours a day, seven days a week; has no entitlement to compensary time off; must meet the same physical standards as prescribed for federally recognized National Guard members; and wears a military uniform while on duty. Plaintiff is exempt from the requirements of state civil service. Ca;. Const., Art VII, section 4(k). His pay and

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recognized.
32 U.S.C. section 101(4);
10 U.S.C. section 101(10).

allowances are determined in accordance with officers of the United States Army. Cal. Mil. & Vet. Code sections 320, 340. He may be disciplined according to the Federal Uniform Code of Military Justice, Cal. Mil. & Vet. Code section 102, reassigned at will to any duty, and called into active service in case of war, insurrection, invasion, tumult, riot, breach of the peace, public calamity, catastrophe or other emergency. Cal. Mil. & Vet. Code section 142, 146.

On April 14, 1991, Frey turned 60 years of age. Section 167 of the California Military and Veterans Code provides for the mandatory retirement of active duty officers such as plaintiff at age 60 or upon the loss

of federal recognition, whichever occurs later. [2] Plaintiff's retirement from active service at age 60 is in accordance with the mandatory retirement age for reserve officers of the United States Army below the rank of major general. 10 U.S.C. 3843. [3] The State informed plaintiff that

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[2]Section 167 provides in part:

(a) All...officers and enlisted personnel on permanent active duty with the Office of the Adjutant General...may remain on active duty with the office either until age 60 or until federal recognition of grade or rank as a member of the California National Guard is withdrawn, whichever occurs later.

[3]Section 3843 provides in relevant part:

...each commissioned officer in a reserve grade below brigadier general who is not a member of the Retired Reserve shall, on the last day of the month in which he

it intended to discharge him at the end of April, 1991, pursuant to section 167.

On October 4, 1990, plaintiff filed a complaint in this action stating four claims for relief. The first claim seeks declaratory relief as to the following questions: (1) whether the Age Discrimination in Employment Act (ADEA or "the Act"), 29 U.S.C. section 621 et sec., applies to plaintiff; (2) whether the provisions of the Cal. Mil. & Vet. Code section 167(a), as applied to plaintiff violate the ADEA; and (3) whether Cal. Mil.

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becomes 60 years of age--(1) be transferred to the Retired Reserve, if he is qualified and applies therefor; or (2) if he is not qualified or does not apply therefor, be discharged from his reserve appointment.

& Vet. Code section 167 can legally require plaintiff to separate from State Active Duty on his 60th birthday. The second claim alleges that Cal. Mil & Vet. Code section 167 directly conflicts with provisions of the ADEA, thereby violating the Supremacy Clause of the United States Constitution. The third claim seeks damages for alleged age discrimination, pursuant to California Fair Employment and Housing Act, Cal. Govt. Code section 12941. [4] The fourth claim

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[4]Section 12941 provides in part that:
(a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge...and individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

The statute apparently exempts age

seeks a preliminary injunction to restrain defendants from forcing plaintiff to retire pending the outcome of this action. [5]

On December 18, 1990, defendants filed the instant motion to dismiss under Fed. R. Civ. P. 12(b)(6). Defendants make a number of arguments in support of their motion, principally (1) that plaintiff failed to exhaust administrative remedies, and (2)

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discrimination which is provided for by law. Thus it would seem that Cal. Mil. & Vet. Code 167, providing for mandatory retirement at 60 years of age, falls within this exemption. The parties have not discussed this issue. Because the Eleventh Amendment bars plaintiff's state claim, the court similarly need not address the matter. See discussion infra at Part IV.

[5]On April 23, 1991, the court denied plaintiff's application for preliminary injunctive relief.

that the ADEA does not apply to members of the California National Guard. [6] These two

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[6]Defendants also argue that the California National Guard is exempt from the ADEA under 42 U.S.C. section 6103(b), that the court lacks jurisdiction to hear constitutional claims arising from military decisions, and that the Eleventh Amendment bars plaintiff's state pendent claim.

The Eleventh Amendment claim is addressed at text at Part IV. In view of the court's conclusion that the ADEA does not apply to California National Guard members, it is not necessary to consider defendants' alternative arguments that 42 U.S.C. section 6103(b) provides an exemption or that claims under the ADEA by military members are not reviewable. See Helm v. State of California 722 F.2d 507 (9th Cir. 1983); Costner v. Oklahoma Army National Guard 833 F.3d 905 (10th Cir. 1987). The court observes that 42 U.S.C. section 6103(b) would not seem to provide a basis for dismissal. If the section applies, it exempts actions that "reasonably" take age into account as a necessary factor. Application of the exemption would require findings of fact.

arguments will be addressed in turn. A complaint should not be dismissed under Fed. R.Civ.P 12 (b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. Exhaustion of Administrative Remedies

Defendants state that a California National Guard regulation provides a procedure for State Active Duty employees such as plaintiff to grieve employment matters. See CAL ARNGR 600-1; CA ARNGR 35-1, section III , 910 (c), section XVI 4959-61. Defendants contend that plaintiff

failed to pursue this grievance procedure, and that the failure to do so requires dismissal of this action.

Plaintiff notes that he exhausted administrative remedies for his age discrimination complaint by filing a complaint with the California Department of Fair Employment and Housing, and by obtaining a right-to-sue letter from that agency.

Section 14(b) of the ADEA, 29 U.S.C. section 633(b), provides:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment

> because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practices no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

Id.

The Supreme Court's decision in Oscar Meyer & Co v. Evans, 441 U.S. 750 (1979), affirms the statute's plain meaning. See also B. Schlei & P. Grossman, Employment

Discrimination Law, at 488 (2d Ed. 1983). In Oscar Meyer & Co., the Court held that in instances where an alleged case of age discrimination occurs in a state which has a law prohibiting such discrimination and authorizing a state authority to grant or seek relief from such discriminatory practice, such as California's Fair Employment and Housing Act, an aggrieved person must first resort to those state remedies before suing in federal court under the ADEA. 441 U.S. at 753. Nothing in the ADEA or in Oscar Meyer & Co suggests that additional administrative remedies must also be exhausted prior to suing in federal court under the ADEA.

Federal courts have routinely held that the ADEA does not require plaintiffs to exhaust state administrative remedies. See, e.g., Shanahan v. WITI-TV Inc., 565 F.Supp. 219 (D.C. Wis. 1982),; Goodman v. Board of Trustees of Community College Dist. 524, 498 F.Supp. 1329 (D.C. Ill. 1980); Bonham v. Dresser Industries, Inc. 424 F.Supp. 891 (E.D. Pa. 1976). aff'd in part, reversed in part on other grounds, 569 F.2d 187 (3rd Cir. 1978); Nickel v. Shatterproof Glass Corp., 424 F.Supp. 884 (D.C. Mich. 1976), aff'd 599 F.2d 1055 (6th Cir. 1979). [7]

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[7]Even had plaintiff failed to obtain a right-to-sue letter from the Department of Fair Employment and Housing, dismissal would not be the appropriate course of action. :[S]uspension pending deferral [to the state

Because plaintiff did file a complaint with the California Department of Fair Employment and Housing, and waited 60 days before filing the complaint here, the court finds that plaintiff's claim is ready for review and should not be dismissed for failure to exhaust administrative remedies. Moreover, if exhaustion of administrative remedies were required prior to bringing an action under the ADEA, the requirement would be waived in this action because exhaustion would be futile. Plaintiff was dismissed because of a state statute requiring his retirement at age 60. No military

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administrative proceeding] is the preferred practice in the federal courts." Oscar Meyer & Co., 441 U.S. at 765 n. 13.

administrator would have authority to refuse to apply the statute or declare it void. See Beller v. Middendorf, 632 F.2d 788, 801 (9th Cir. 1980).

III. Does the ADEA Apply to Plaintiff?

The central question in this case is whether or not the ADEA applies to Plaintiff. On its face the statute would seem to apply. The Act provides that:

> It shall be unlawful for an employer-- (1) to fail or refuse to hire or to discharge any individual...because of such individual's age...
>
> 29 U.S.C. section 623(a).

The ADEA was enacted in 1967 and

originally did not apply to state and federal employees. In 1974 the act was extended to public employees. Section 630(b)(2) of Title 29, was amended to define the term "employer" as including "a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State..." The Act does not provide an exception for state military personnel. [8] Similarly, Section 633(a) of Title 29 extended ADEA protection to federal employees.:

> All personnel actions affecting

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[8]In 1986 Congress exempted state firefighters and law enforcement officers from the Act. 29 U.S.C. sections 623(i), 630(j), (k).

employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 [U.S. Code], in executive agencies...in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial

> branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Id. (emphasis added).

In a more typical case of statutory interpretation the analysis could end here: Plaintiff is to be discharged because of his age, and the state national guard is an agency or instrumentality of the State of California. But this is not a typical case of statutory construction. The employment action at issue in this case--the

appointment of state military officers--involves a sphere of activity in which the states have substantial authority. See U.S. Const., art. I, section 8, cl. 16. [9] The Ninth Circuit has held that Congress did not intend the ADEA to apply to members of the federal armed forces, including federally recognized members of the state national guards. See Helm v. State of California 722 F.2d 507 (9th Cir. 1983). Although the

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[9]The militia clause provides that Congress has the power: "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress," U.S. Const. art I, section 8, cl. 16.

matter is by no means free from doubt, the court concludes that Congress could not have intended to apply the ADEA to the commissioning of state military officers by the state militias--an area delegated to the states by the Constitution--and to exempt the federal armed forces, including the National Guard of the United States, over which it has plenary authority. See Chapell v. Wallace, 462 U.S. 296, 301 (1983). More specifically, Congress could not have intended a statutory scheme in which plaintiff could be removed from the National Guard of the United States because of his age but could not be removed from the National Guard of the State of California

for the same reason.

A. ADEA and Title VII Precedents

As noted above, the ADEA now covers federal "military departments." Relying on Title VII cases, the Ninth Circuit has held that the phrase "military departments" refers only to civilian employees of the armed services and not to uniformed members of the services.

In Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983), the court held that Title VII only applies to civilian employees of the military services. Plaintiff was a commissioned officer in the Army. He filed suit under Title VII claiming that he had not ben promoted by the

Army on several occasions on account of his race. Title VII--like the ADEA--applies to "[a{ll personnel actions affecting employees...in military departments as defined expansively in 5 U.S.C. section 102 to include the Departments of the Army, Navy, and the Air Force. On the other hand, 10 U.S.C. section 101(4) defines the term "armed forces" as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." Because of these two definitions, the court concluded that "Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel," and thus that the term

'military departments' as used in Title VII "can be fairly understood to include only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel." 718 F.2d 928.

The intricate statutory construction undertaken in Gonzalez reflects the 'special status" and "unique structure" of the military. Chappell. 462 U.S. at 301, 303. Absent express direction from Congress, courts will not readily interpret statutory language of general application to include the armed forces. Thus, the Gonzalez court quoted with approval from the Eight Circuit's opinion in Johnson v. alexander, 572 F.2d 1219 (1978), in which the Eight

Circuit held that Title VII did not apply to the uniformed military:

> [W]e think that if Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms. We agree with the district court that neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States.

718 F.2d 928 (quoting 572 F.2d at 1224 (footnote omitted)).

The Eleventh Circuit also has held that Title VII does not apply to the uniformed military. Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987). In Stinson a member of the Alabama National Guard brought a Title VII action alleging race discrimination against the Alabama National Guard and individual officers. The court held that plaintiff should be considered military personnel and not an employee of the state of Alabama:

> (1) Stinson wore a military uniform during periods of active duty and/or training; (2) he served on full-time military duty; (3) he was paid by the

> federal government and not by the State of Alabama: and (4) he was subject to military discipline on a daily basis. Thus, we conclude that Stinson, a member of the National Guard, is not an employee of the State of Alabama for purposes of Title VII.

821 F.2d 1539-40.

In Helm v. State of California, 722 F.2d 507 (9th Cir 1983), the court applied Gonzalez to the ADEA because "Title VII uses language identical to that in the ADEA to bar discrimination against 'employees...in military departments as defined in 102 of Title 5,' " and because the Ninth Circuit

has applied Title VII precedents to the ADEA. Id. at 509 (citing Bunch v. United States, 548 F.2d 336, 340 n.6 (9th Cir 1977)). In Helm, plaintiff was an officer in the California National Guard and, because of federal recognition, he was also a member of the Army National Guard. Plaintiff claimed that he had been denied promotion because of his age and sued the state and federal national guards under the ADEA. Un the basis of Gonzalez, the court held that the "ADEA does not apply to military reservists."

The Seventh Circuit reached the same conclusion in Kawitt v. United States, 842 F.2d 951 (1988), holding that the ADEA did

not apply to uniformed military personnel. In Kawitt plaintiff was a lawyer in the Naval Reserve. Sounding the same note of caution found in Gonzalez and Johnson, the court stated:

> Under neither [Title VII or the ADEA] is the interpretation that excludes uniformed military personnel inevitable as a matter of semantics, but it makes compellingly good sense, particularly in the case of the age-discrimination law. Military efficiency demands that the services have a free hand in establishing age ceilings

designed to ensure that the nation's soldiers, sailors, and airmen are young and fit enough to meet the challenges of military service. Of course in modern war only a small fraction of military personnel serve in combat units, and it is hardly to be supposed that youth and physical fitness are prime credentials for service in the legal departments of the armed forces. But judges should be reluctant to assume the micromanagement of military age-grading policies, and without a

clearer directive from Congress we decline to do so.

842 F.2d at 953-54.

B. The ADEA and the State National Guard

Defendants contend that Helm controls this case. Certainly, it is on point, but plaintiff's loss of "federal recognition," removes him from "that part of the organized militia of the [State of California]" which constitutes the National Guard. See 10 U.S.C. sections 101(10), (10)(D), (9). Plaintiff is not an employee of either a "military department" or the "armed forces" as those terms are defined in Titles 5 and 10 of the U.S. Code and by the Ninth Circuit

in Gonzalez and helm. Thus, the close statutory construction in Gonzalez, applied by Helm to the ADEA, does not apply here, and Helm is not controlling. Nonetheless, the holdings and approach in Helm and Gonzalez, as well as Stinson and Kawitt, suggest rather strongly that Congress did not intend the ADEA to apply to commissioned officers in the state National Guard.

To interpret the statute otherwise would lead to a structure inconsistent with, senseless, and unexplained. It is most unlikely that Congress intended to permit the federal military to discharge plaintiff because of his age, but to prohibit state military officials from acting in accordance

simply because plaintiff had lost federal recognition. Surely, if Congress had intended such a result it would have said so and explained its reasons. The parties agree that plaintiff is a full-time, active duty military officer, that he wears a military uniform while on duty, and that he is on call 24 hours a day, seven days a week. In these respects, he is functionally indistinguishable from other guard members who have federal recognition or the plaintiff in Stinson, supra, See Sebra v. Neville, 801 F.2d 1135 (9th Cir. 1986). The deference and restraint the courts apply to military questions is just as appropriate to the state militia as to the Army National

Guard. In the language of Stinson, plaintiff is military personnel, not a state employee, and, to paraphrase Gonzalez and Johnson, if Congress "had intended for the stature to apply to the uniformed personnel" of the states, "it would have said so in unmistakable terms." Yet there is no indication anywhere in the statute or legislative history which explicitly or implicitly suggests that plaintiff should be accorded a cause of action under the ADEA simply because the United States has withdrawn federal recognition.

Indeed, it would be particularly odd to read the statute as providing less deference to the state militia than to the National

Guard of the United States. The Constitution reserves "to the States respectively, the Appointment of the Officers" of the militia. U.S. Const., art I, section 8, cl. 16. [10]

The statutes and regulations governing the National Guard recognize and preserve this constitutional authority of the states. See 32 U.S.C. section 324(b) ("the appointment of an officer of the National Guard may be terminated or vacated as provided by the laws of the State or Territory of whose

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[10]The decision here that the ADEA does not apply to the state militia avoids the necessity of deciding whether such application would violate the Militia Clause of the Constitution, as defendants suggest in their supplemental brief. Cf. E.E.O.C. v. Wyoming, 460 U.S. 226 (1983).

National Guard he is a member"); 32 U.S.C. App. section 1101.5 ("The termination of the appointment of a commissioned officer of the National Guard is a function of the State authorities"); 32 U.S.C. App. section 1101.2(a)(1) ("Article 1, section 8, Clause 16, of the Constitution of the United States reserves to the States the appointment of officers in the militia"). To read the ADEA as plaintiff suggests would limit, if not conflict with, the discretion accorded to the states by statute, regulation, and the Constitution. It bears repeating that had Congress intended such a result it would have said so unmistakably.

Finally, it would be paradoxical to

hold that the ADEA applies to the state militia for the very reason that the Act did not specifically provide that it applied to the "military departments" of the states. Yet this would be the result if Helm were distinguished on the basis that plaintiff here lacks federal recognition and thus is not a member of the federal armed forces. It seems far more sensible to understand Congress' failure to expressly include the states' military departments within the definition of employer as an indication that the states' military departments are not covered by the Act.

The court recognizes that the question here presented is close. But in light of

the applicable Ninth Circuit case law holding the National Guard of the United States exempt from the ADEA, the deference accorded to the states in the appointment and termination of its militia officers, and the restraint with which the courts approach statutory construction when the subject matter involves the uniformed military, the court holds that the military departments of the states, when taking actions affecting uniformed active duty officers of the state national guard, are not included within the definition of "employer" at 29 U.S.C. section 630(b). It follows that the state's employment action, taken under a state statute, is not preempted by federal law.

IV. Plaintiff's Pendant Claim of Discrimination

The Eleventh Amendment bars plaintiff's state pendant claim for discrimination under Cal. Gov. Code section 12941. The Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

In Hans v. louisiana, 134 U.S. 1 (1890), the Court held that the Amendment barred suit in

federal court brought against a state by one of its own citizens. Even if plaintiff were to amend his complaint to add individual state officers, the result would be the same. In Ex Parte Young, 209 U.S. 123 (1908), the Court held that a suit seeking to enjoin a state officer from conducting allegedly illegal action was not a suit against the state for purposes of the Eleventh Amendment. The Court reasoned that when a state officer acts illegally, the officer is not acting on the state's behalf. The doctrine of Ex Parte Young only applies, however, to state officers who violate federal law, not to officers who allegedly violate state law. Pennhurst State School

& Hospital v. Halderman, 465 U.S. 89 (1984).

Conclusion

For the foregoing reasons, and good cause appearing therefor, IT IS HEREBY ORDERED that defendants' motion to dismiss is granted.

IT IS SO ORDERED.

DATED: June 4, 1991

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DAVID F. LEVI, Judge

United States District Court

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 1993, a true and correct copy of the foregoing Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to the following: California State Attorney General, Assistant Deputy Attorney General 1515 K Street, Suite 511. P.O. Box 944255, Sacramento, CA 94244-2550.

LEO F. DONAHUE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARCHER FREY,
Plaintiff-Appellant,
v.
STATE OF CALIFORNIA; STATE OF CALIFORNIA MILITARY DEPARTMENT,
Defendants-Appellees.

No. 91-16162
D.C. No. CV 90-01234-DFL
OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
July 22, 1992—San Francisco, California

Filed January 5, 1993

Before: William C. Canby, Jr., Stephen Reinhardt, and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

Individual Rights/Labor and Employment/Employment Discrimination

Affirming a district court judgment granting a motion to dismiss an action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the court of appeals held that Congress' failure to expressly include the states' military departments within the definition of employer showed its intent to exclude the

military departments of the states from the protections of the Age Discrimination in Employment Act (ADEA).

Appellant Archer Frey was terminated as a commissioned officer in the California National Guard under Cal. Mil. & Vet. Code section 167(a). That section provides for mandatory retirement at age 60 of state active duty commissioned officers of the California National Guard who can no longer be called into active federal service. Because he had attained 30 years of commissioned service, Frey lost federal recognition, the effect being that he ceased to be a member of the Army National Guard. Frey filed an action in district court seeking a declaration that the Age Discrimination in Employment Act (ADEA) applied to him, section 167 violated the ADEA, and section 167 conflicted with ADEA in violation of the Supremacy Clause. Frey also sought damages for the alleged age discrimination and a preliminary injunction to restrain the state from forcing him to retire pending the outcome of this action. Frey did not appeal the district court's denial of injunctive relief. However, the district court granted the state's motion to dismiss the action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

[1] Initially, the court noted that although, in 1986, Congress amended the ADEA to exempt certain state personnel from its provisions, no such exemption was provided for state military personnel. [2] The court noted that the California statute in this case involved a scope of activity in which the states have traditionally exercised considerable power, both constitutional and statutory. [3] The Ninth Circuit has previously recognized that the ADEA does not apply to federally recognized military reservists. [4] Similarly, the Ninth Circuit and other circuits have consistently held that Congress did not intend to extend the protections of Title VII or the ADEA to members of the state National Guard. [5] The policy considerations that precluded the court from applying the ADEA to the federal military in the absence of a clear congressional directive similarly precluded the application of the ADEA to

the state militias based solely upon the loss of federal recognition, when Congress has not expressly so directed. [6] Thus, under these circumstances, Frey's loss of federal recognition alone could not justify according less deference to the state militia than to the federal National Guard. There was no suggestion, either in the ADEA or its legislative history, that the Act should apply to the state military departments.

COUNSEL

Leo F. Donahue, Gold River, California, for the plaintiff-appellant.

S. Michelle Inan, Deputy Attorney General, Oakland, California, for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

Archer Frey appeals from the district court's dismissal of his action alleging that the California National Guard violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by requiring him to separate from active duty on his sixtieth birthday pursuant to Section 167 of the California Military and Veterans' Code. Frey filed this action against the State of California and the State of California Military Department seeking, *inter alia*, a judicial declaration that section 167 violated the ADEA. In granting the state's motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), the district court held that the military departments of the states, when taking actions affecting active duty officers of the state national guard, are not "employers" within the meaning of the ADEA.

FACTS AND PROCEDURAL BACKGROUND

Archer Frey was a commissioned officer in the California National Guard on State Active Duty in the Office of the Adjutant General. He served in the State Guard from 1971 until 1991, when he was terminated under the authority of section 167, which contains a provision for mandatory retirement at age 60 for state active duty commissioned officers of the California National Guard who can no longer be called into active federal service.[1] Frey's retirement from active service at age sixty comports with the mandatory retirement age for reserve officers of the United States Army below the rank of major general. *See* 10 U.S.C. § 3843.

In 1985, because he had attained 30 years of commissioned service, Frey lost federal recognition, the effect being that he ceased to be a member of the National Guard of the United States (Army National Guard).[2] From 1985 until his manda-

[1]Section 167(a) provides:

> All commissioned and warrant officers and enlisted personnel on permanent active duty with the Office of the Adjutant General shall be appointed by the Governor, with consideration of the recommendation of the Adjutant General and, except for the Adjutant General, the Assistant Adjutant General, and officers assigned to general officer positions, may remain on active duty with the office either until age 60 or until federal recognition of grade or rank as a member of the California National Guard is withdrawn, whichever occurs later.

Cal. Mil. & Vet. Code § 167(a).

[2]The National Guard of the several states and the National Guard of the United States are overlapping entities. As in Frey's case, one may be a member of the State National Guard, but not a member of the Army or Air National Guard of the United States. Thus, by statute, the term the "Army National Guard" is defined as follows:

> [T]hat part of the organized militia of the several States ... that—(A) is a land force; (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution; (C) is organized, armed, and equipped wholly or partly at Federal expense; and (D) is federally recognized.

32 U.S.C. § 101(4); 10 U.S.C. § 101(10).

tory retirement. Frey served only as a military officer in the California National Guard. *See* 32 U.S.C. § 323(a); Calif. Mil. & Vet. Code § 210. His job title during all relevant periods was Chief, Engineering Branch, and his rank at retirement was Colonel. Frey never served on active duty in the regular United States Army.

Frey's loss of federal recognition[3] meant he could no longer be called into active federal service. Notwithstanding the loss of federal recognition, as a member of the California National Guard on state active duty, Frey was subject to being called to duty 24 hours a day, seven days a week; he had no entitlement to compensatory time off; he was required to meet the same physical standards as prescribed for federally recognized National Guard members; and he wore a military uniform while on duty. Frey was exempt from the requirements of state civil service. *See* Cal. Const. art. VII, § 4(k). His pay and allowances were determined in accordance with those of officers of the United States Army. *See* Cal. Mil. & Vet. Code §§ 320, 340. Discipline, if necessary, was determined according to the Federal Uniform Code of Military Justice, *see id.* at § 102, and he was subject to reassignment at will to any duty, or being called into active service in case of war, insurrection, rebellion, invasion, tumult, riot, breach of the peace, public calamity, catastrophe, or other emergency. *See id.* at §§ 142, 146.

Prior to his sixtieth birthday, the State informed Frey that it intended to discharge him at the end of April 1991, under

[3]Federal recognition is the acknowledgment by the Federal Government that an officer [of the state militia] appointed, promoted, or transferred to an authorized grade or position vacancy in the Army National Guard meets the prescribed laws and regulation governing the action. National Guard Regulation 600-100, ¶ 1-3(b). The loss of federal recognition means that the officer no longer participates in federally-paid duty status, which includes activities such as drills, annual training, or service schools at any cost to the federal government, nor may he be called into active federal service.

the authority of section 167. In response, Frey filed this action alleging four claims and seeking, *inter alia*, a declaration that the ADEA applies to him and section 167 violates the ADEA. The complaint also alleged that section 167 directly conflicts with the provisions of the ADEA, thereby violating the Supremacy Clause of the United States Constitution. In addition, he sought damages for the alleged age discrimination and a preliminary injunction to restrain the State defendants from forcing him to retire pending the outcome of this action. The district court denied his request for preliminary injunctive relief, and Frey did not appeal from that denial.

The State then moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. In granting the State's motion, the district court held that the military departments of the states, when taking actions affecting uniformed active duty officers of the state national guard, are not included within the definition of "employer" as that term is defined under the ADEA, 29 U.S.C. § 630(b). The court went on to conclude that because this was a state employment action, taken under a state statute, it could not be preempted by federal law. Frey filed a timely appeal from the district court's dismissal.

STANDARD OF REVIEW

We review *de novo* a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990).

DISCUSSION

Frey characterizes his status as that of a state employee, defined by 28 U.S.C. § 630(f), rather than that of federal military personnel. He asserts that because the ADEA applies to state employees, *see* 29 U.S.C. § 630(b), he is eligible to claim the protection of the ADEA. Frey argues that the clear

language of section 630(f) evinces Congress' intent to capture, with few exceptions, all state employees, including Civil Service employees, within the provisions of the ADEA. *See* 29 U.S.C. § 630(f). Frey claims that the four statutory exceptions must be narrowly construed and do not apply to him. Additionally, Frey maintains that section 167 violates the Supremacy Clause of the United States Constitution as it is in direct conflict with the ADEA.

A. *Statutes*

Section 623(a) provides in relevant part that: "[i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's age. . . ." 29 U.S.C. § 623(a). The term "employer" is defined by the ADEA to include "a State or political subdivision of a State." *Id.* at § 630(b). Similarly, section 633a extended the ADEA to protect federal employees as well.[4] Finally, section 630(f) of the ADEA defines the term "employee" as follows:

> [A]n individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with

[4]Section 633a(a) provides:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments as defined in section 102 of Title 5, in executive agencies . . . in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination on the basis of age.

> respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. . . .

29 U.S.C. § 630(f). Although, in 1986, Congress amended the ADEA in order to exempt state firefighters and law enforcement officers from the Act, *see id.* at §§ 623(j), 630(j), (k), no such exemption was provided for state military personnel.

B. *Merits*

[1] Historically, our court has restricted its review of military decision making out of deference "to the special function of the military in our constitutional structure and in the system of national defense." *Sebra v. Neville*, 801 F.2d 1135, 1140-41 (9th Cir. 1986); *accord Gilliam v. Miller*, No. 91-35085, slip op. at 10119 (9th Cir. August 21, 1992); *see also Gonzalez v. Department of Army*, 718 F.2d 926, 930 (9th Cir. 1983) (court declining to enter into an area of military expertise even in the face of a claim of intentional race discrimination). Although the California statute at issue in this case is not a traditional "military decision" similar principles apply when Congress or the states take actions affecting the militia.

[2] Article I, section 8 of the United States Constitution explicitly grants Congress plenary authority over the military. *See* U.S. Const. art. I, § 8, cl. 12-16 (the "Militia Clauses"). One provision in the Militia Clauses confers upon Congress the power "[t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States." *Id.* at cl. 16. That provision, however, reserves to the states "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* The statutes and regulations governing the National Guard recognize the constitutional source of the states' power and refrain

from intruding on it unnecessarily. *See* 32 U.S.C. § 324(b) ("the appointment of an officer of the National Guard may be terminated or vacated as provided by the laws of the State or Territory of whose National Guard he is a member"); 32 U.S.C.A. § 1101.5 ("The termination of the appointment of a commissioned officer of the National Guard is a function of the State authorities"); 32 U.S.C.A. § 1101.2(a)(1) ("Article 1, section 8, Clause 16, of the Constitution of the United States reserves to the States the appointment of officers in the militia"). Here, the state legislature, by way of Cal. Mil. & Vet. Code § 167, adopted a mandatory retirement provision that simply parallels the mandatory retirement age for reserve officers of the U.S. Army imposed by Congress. *See* 10 U.S.C. § 3843. Thus, the state statute at issue here involves a scope of activity—the appointment of state military officers—in which the states have traditionally exercised considerable power, both constitutional and statutory.

Indeed, the Supreme Court has repeatedly emphasized the special status of the military in our judicial system. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 301, 303 (1983). "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel." *Id.* at 303-04. In the absence of clear Congressional intent, the courts must not readily interpret statutory language of general application to include the military. *See Gonzalez*, 718 F.2d at 928 (" 'If Congress had intended for [Title VII] to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms.' " (citation omitted)); *see also Kawitt v. United States*, 842 F.2d 951, 954 (7th Cir. 1988) ("[J]udges should be reluctant to assume the micromanagement of military age-grading policies, and without a clearer directive from Congress we decline to do so.").

Our circuit was confronted initially with whether protections provided by Title VII, 42 U.S.C. § 2000e-16(a) (Supp.

V 1981) (provisions relating to federal employees), were extended to uniformed members of the Armed Forces. *Gonzalez*, 718 F.2d at 927. The plaintiff, a commissioned officer in the Army, brought an action under Title VII, alleging that he would have been promoted but for the intentional race discrimination practiced by the Army.

Section 717(a) of Title VII, applies to "[a]ll personnel actions affecting employees . . . in military departments as defined in section 102 of Title 5." 42 U.S.C. § 2000e-16(a). *See also Gonzalez*, 718 F.2d at 927. The note following 5 U.S.C. § 102 states that military department was defined in that section in order to avoid the necessity for defining "military departments" each time it was used in Title 5. 5 U.S.C. § 102 note (1982). The note then cites section 101(7) of Title 10, which also contains a definition of military departments. *Id.*

We undertook a comparison of the definition of the term "military department" as provided by section 102 of Title 5, with that of section 101(7) of Title 10, Armed Forces. *Gonzalez*, 718 F.2d at 927-28. Although the two definitions of the term "military departments" are similar, section 101 of Title 10 contains a separate definition for "armed forces." 10 U.S.C. § 101(4); *Gonzalez*, 718 F.2d at 928. We reasoned that the two differing definitions indicated that Congress intended a distinction between "military departments" and "armed forces," the former consisting of civilian employees, and the latter of uniformed military personnel. *Id.* Consequently, we held that section 717(a) did not make Title VII applicable to uniformed members of the armed forces. *Id.* at 929. *See also Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987) (The court characterized a member of the Alabama National Guard as "military personnel", which rendered Title VII inapplicable.), *cert. denied*, 488 U.S. 959 (1988); *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) (The court declared Title VII inapplicable to persons enlisted in the Armed Forces of the United States, including the National Guard.).

[3] In *Helm v. California*, 722 F.2d 507, 509 (9th Cir. 1983), the plaintiff was a federally recognized officer in the California National Guard. Due to his federal recognition, he was also a member of the Army National Guard. Claiming that he was wrongfully denied a promotion, the plaintiff sued the state and federal national guards under the ADEA. Section 633a of the ADEA, applicable to federal agencies, uses language identical to that in Title VII; namely, discrimination against "employees . . . in military departments as defined in § 102 of Title 5" is prohibited. 29 U.S.C. § 633a(a); 42 U.S.C. § 2000e-16(a). Relying on *Gonzalez*, we held that the ADEA does not apply to federally recognized military reservists. *Helm*, 722 F.2d at 509; *accord Kawitt*, 842 F.2d at 953-54; *see also Costner v. Oklahoma Army National Guard*, 833 F.2d 905, 907-08 (10th Cir. 1987) (Plaintiff's age discrimination claim against the state national guard was nonreviewable, notwithstanding the fact that plaintiff was both a civilian employee and a member of the guard.).

While *Gonzalez* and *Helm* are instructive, they are not dispositive of this case because the loss of federal recognition by Frey, resulted in his removal from "that part of the organized militia of the [State of California]" which constitutes the National Guard of the United States. *See* 10 U.S.C. § 101(10). The plaintiffs in *Gonzalez* and *Helm* clearly fell within the definition of "armed forces." *See* 10 U.S.C. § 101(4). Armed forces is defined to include the Army, *id.*, and the Army is defined to include the Army National Guard. *See* 10 U.S.C. § 3062(c)(1).

Frey's loss of federal recognition meant he could no longer be called into active federal service. Nevertheless, as a member of the California National Guard on state active duty, Frey was subject to nearly all of the same discipline and working conditions as members of the federally recognized Guard.

[4] Our court's holdings in *Gonzalez* and *Helm*, as well as decisions by other circuits—*Kawitt*, *Stinson*, *Taylor*, and

Costner, do, however, demonstrate a consistent judicial interpretation that Congress did not intend to extend the protections of Title VII or the ADEA to members of the state National Guard. The courts have held that these Acts do not apply to the military primarily because of a determination that, if Congress had intended to encroach upon the special status of the military in our system by extending these protections, it would have expressed its intention clearly.

[5] The policy considerations that preclude us from applying the ADEA to the federal military in the absence of a clear congressional directive similarly preclude the application of the ADEA to the state militias based solely upon the loss of federal recognition, when Congress has not expressly so directed. As the district court recognized:

> It is most unlikely that Congress intended to permit the federal military to discharge plaintiff because of his age, but to prohibit state military officials from acting in accordance simply because plaintiff had lost federal recognition. . . . The deference and restraint the courts apply to military questions is just as appropriate to the state militia as to the Army National Guard.

[6] Under these circumstances, Frey's loss of federal recognition alone cannot justify this court according less deference to the state militia than to the National Guard of the United States. There is no indication from Congress, either in the ADEA or its legislative history, to suggest that the Act should apply to the state military departments. Due to the special status of the military, we hold that Congress' failure to expressly include the states' military departments within the definition of employer demonstrates an intent to exclude the military departments of the states from the ADEA. The judgment of the district court is affirmed.

AFFIRMED.